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86-556

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

LAMONT MOORE & EDWIN BRYCE,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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28 pp

QUESTION PRESENTED FOR REVIEW

Do the Eighth and Fourteenth Amendments to the Constitution of the United States forbid pre-trial bail bonds in a drug case arbitrarily set at one million dollars with full cash security when none of the traditional factors usually applied in pre-trial release determinations support that amount and it is demonstrably beyond the capacity of Petitioners to post?

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In The
Supreme Court of the United States
October Term, 1986

LAMONT MOORE & EDWIN BRYCE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Lamont Moore and Edwin Bryce by their attorneys petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois setting pre-trial bail for each of the petitioners in the amount of one million dollars and requiring full cash security therefore.

OPINIONS BELOW

Bail was first set for petitioners in the Circuit Court of Cook County of Illinois, Municipal Division, Honorable Thaddeus Kowalski, Judge presiding, by docket entry in the amount of two million seven hundred thousand dollars, full cash required. Subsequently, the Appellate Court of Illinois First District, hearing the matter upon emergency motion, reduced the bail of each of the Petitioners to two hundred thousand dollars requiring a deposit of ten percent of that amount. The Appellate Court decision was promulgated by the orders we have reproduced in the appendix, A-3, 4. No additional opinion was filed in the Appellate Court. On motion of the State the Supreme Court of Illinois increased the pretrial bail for each of the Petitioners to one million dollars, full cash required. We have reproduced the Supreme Court's orders in their entirety in the appendix, A- 1, 2. No additional opinion was filed in the Supreme Court.

JURISDICTION

The judgment of the Supreme Court of Illinois setting bail in the amount of one million dollars full cash was entered on June 25, 1986. Subsequent petition for rehearing and reconsideration of that order was denied by order dated August 6, 1986, A-1. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C., Sec. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. The pertinent portions of the texts are set out below:

Eighth Amendment:

> "Excessive bail shall not be required . . . "

and

Fourteenth Amendment:

> " . . . [N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATUTES INVOLVED

Chapter 38, Illinois Revised Statutes 1985, Section 110-7(a) states, in part:

> When a person for whom bail has been set is charged with an offense under the "Illinois Controlled Substances Act" which is a Class X felony, the court may require the defendant to deposit a sum equal to 100 percent of the bail.

Chapter 38, Illinois Revised Statutes 1985, Section 110-5(b)(4) provides:

> When a person is charged with a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance as defined in the Cannabis Control Act, as amended, or the Illinois Controlled Substances Act, as amended, the full street value of the drugs seized shall be considered. "Street Value" shall be determined by the court on the basis of a proffer by the State based upon reliable information of a law enforcement official contained in a written report as to the amount seized and such proffer may be used by the court as to the current street value of the smallest unit of the drug seized.

STATEMENT

On March 11, 1986, Lamont Moore and Edwin Bryce were arrested by officers of the Chicago Police Department in a hotel room in Chicago. The officers went to the hotel room after they had been contacted by an employee of an entirely different hotel and advised that a firearm and five kilograms of cocaine had been found in a room at that location. The room had been locked by the hotel because the rental had not been paid. The hotel employee told the police that an unnamed individual had sought his assistance in obtaining possession of a green bag containing the cocaine from the room. A check of telephone calls from that room disclosed that its occupant had called a room at another hotel. The police went to the second hotel where the arrest of Petitioners took place. From the

second hotel room police also seized a quantity of marijuana worth about $140.00. Petitioner Bryce was identified as the individual who tried to obtain the green bag and Petitioner Moore was identified as the individual who had registered for the room initially.

At Petitioners' first court appearance on March 12, 1986, in the Municipal Division of the Circuit Court of Cook County, the prosecutor alleged that the "street value" of the cocaine seized was estimated at two million seven hundred thousand dollars. The Court set bail in that amount requiring the deposit of full cash security. Petitioners moved the Court to reduce the bail when the case was next called on March 14, 1986. Both claimed a right to reduction notwithstanding the Illinois statutes based upon the Fourteenth Amendment to the Constitution incorporating the Eighth Amendment protection against the imposition of excessive bail. The matter was continued on that day until the following week because of the unavailability of the police report in the case. In the meantime, Petitioners moved for a reduction of bond in the Appellate Court of Illinois, First Judicial District. That Court remanded to the Circuit Court, Municipal Division for a hearing on the motions to reduce. On March 19, 1986, that hearing proceeded.

It was established that neither Petitioner had a previous arrest record in Chicago or any place else. Both were resident in Los Angeles, California, and regularly employed there. Neither was or had ever been a fugitive nor was any legal process outstanding for Bryce or Moore. A police officer testified on behalf of the State to the convoluted and imprecise computation of the street value of the cocaine based on the most common smallest unit sold illicitly in Chicago. The computation involved an allowance for diluting each kilogram seized eight or nine times to reduce it to "street level" strength thereby increasing the volume substantially. The computation was based on a per gram common price of the so diluted cocaine but no allowance was made either for the cost of the

diluent or the profit margin of any of the intermediaries in the distribution process described by the officer. By that process the witness ultimately estimated the street value of the cocaine seized at two million seven hundred thousand dollars. At the conclusion of the hearing, Judge Kowalski of the Municipal Division denied the motions to reduce the bond and continued the bail at two million seven hundred thousand dollars cash. The Judge recognized that the amount was far greater than either of Petitioners "could realistically post," T. (3/19/86) 102. He stated:

> "I mean in actuality, it is such a high amount that no one but a handful of people in the United States could [post it]." T.(3/19/86) 98.

The Judge felt that the street value and full cash provisions of the Illinois statutes required that bail.

Petitioners returned to the Illinois Appellate Court, First District, and on March 21, 1986, the Court granted Petitioners' motions and reduced their bail. The Appellate Court reduced the amount of the bond to two hundred thousand dollars in each case and required only ten percent of that amount as cash security. Petitioners each posted twenty thousand dollars with the Clerk of the Circuit Court and obtained their liberty on bail pursuant to that order. They have since been present in Court on each occasion on which the case has been called, both in the Municipal Division and subsequently, after indictment, in the Criminal Division of the Circuit Court. The normal conditions of the bonds were amended by the Chief Judge of the Criminal Division to permit Petitioners to travel to and from their homes except as their appearances are required in court. The indictment of Petitioners remains on the docket of the Criminal Division of the Circuit Court. It is pending and untried.

Meanwhile, the State's Attorney of Cook County filed an original petition in the Supreme Court of Illinois to increase Petitioners' bonds. Petitioners first objected to the jurisdiction of that Court based on the departure from tradi-

tional Illinois practice the State's petition represented. No petition for Leave to Appeal from the Appellate Court order was filed by the State, nor was the matter heard on Notice of Appeal from any order of the Circuit Court. The Supreme Court of Illinois declined to dismiss the petition on procedural grounds and, after Petitioners were given an opportunity to respond on the merits, the Supreme Court entered an order on June 25, 1986 setting bond for each of the Petitioners in the amount of one million dollars full cash. Petitioners filed motions for reconsideration and for rehearing. Those motions were denied by the Supreme Court of Illinois on August 6, 1986. Neither order of the Illinois Supreme Court is accompanied by any opinion, memorandum, or other explanation making reference to the constitutional question involved. We have reproduced those orders in full in the appendix. On motion of Petitioners' the enforcement of the Supreme Court's orders of June 25, 1986, and August 6, 1986 were stayed pending the filing of a Petition for Writ of Certiorari in this Court.

REASONS FOR GRANTING THE WRIT

This case presents the question this Court could not decide in *Murphy v. Hunt*, 455 U.S. 478, because the controversy there had become moot. It is Petitioners' position that their Eighth Amendment right to protection against the imposition of excessive bail, protected against State action by the Fourteenth Amendment, has been infringed by the Illinois Supreme Court's arbitrary decision setting bond for each of Petitioners in the amount of one million dollars full cash. The arbitrary nature of that Court's order is exacerbated by the total lack of any opinion, memorandum, or simple statement of any reasons supporting it. The one million dollar cash bail set by the Court constitutes a round figure otherwise without any bearing upon the case. There is no correlation between that figure and the means of Petitioners and we suggest that it represents bail set to ensure pre-trial incarceration, not to permit pre-trial release.

The basic opinion delineating the scope of the Eighth Amendment's prohibition of excessive bail is *Stack v. Boyle*, 342 U.S. 1. The opinion of Chief Justice Vinson explored the importance of reasonable pre-trial bail to the balanced functioning of the constitutional criminal justice system:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. 1, 4.

The Court went on to hold that bail should be determined with reference to its primary purpose, that of assuring the presence of a defendant when his appearance is required. The fact alone of a serious criminal charge was not sufficient to demonstrate the need in that case for bail in an unusual amount. There must be a factual showing related to the likelihood of flight:

> "To infer from the fact of an indictment alone, a need for bail in an unusually high amount is an arbitrary act." 342 U.S. 1, 6.

With *Stack v. Boyle* as background, *Murphy v. Hunt*, 455 U.S. 78, arose under a Nebraska constitutional provision permitting the total denial of bail at the pre-trial stage to any defendant accused of a violent sexual offense. Nebraska had added rape to the traditional category of non-bailable offenses, normally limited to treason and capital murder where the proof is evident and the presumption great. Because by the time the bail issue could be reviewed in the federal system, defendant had been tried and convicted of some of the charges against him, this Court dismissed his federal *habeas corpus* petition as moot. He was no longer entitled to pre-trial bail under the Eighth Amendment in any event. This case does not present that problem. The charges against Moore and Bryce remain pending and untried. Petitioners are entitled to Eighth Amendment protection as it applies against arbitrary

state action through the Fourteenth Amendment.

Until this case the law in Illinois was not different. *People ex rel Hemingway v. Elrod*, 60 Ill. 2d.74, 322 N.E. 2d 837 (1975) is the basic case. In it the Illinois Supreme Court outlined the nature of those factors which must justify the denial of bail to defendants accused of bailable offenses. The offense with which defendant was accused in *Hemingway* was a bailable offense, murder but not capital murder. The opinion went on to describe two considerations which, when established by sufficient proof, may justify the denial of bail. One such consideration relates to the risk of flight. The second concerns preventing "interference with witnesses or jurors or to prevent the fulfillment of threats . . . " 322 N.E. 2d. 837, 840. Not only are the offenses with which these Petitioners are charged bailable offenses under the Illinois statutes, but no evidence has been presented before either the Municipal or Criminal Divisions of the Circuit Court or relied upon in the pleadings filed by the State in the Appellate Court or Supreme Court of Illinois relating to the likelihood of flight or the proclivities of either Petitioner pertinent to the need to protect the public within the meaning of the Illinois Supreme Court's own *Hemingway* opinion. There are no threats here. There are no allegations that the safety or physical well being of any witness is in jeopardy. There is not even any generalized allegation of any violent propensities of Petitioners. Under the traditional view of bail long held in Illinois as well as under the Eighth Amendment, Petitioners are eligible for pre-trial release upon the posting of a bond sufficient to ensure their subsequent court appearance.

Do the recent amendments to the Illinois statutes regarding street value of contraband and a requirement of full cash security in drug cases alter that traditional, and concededly constitutional, view of bail to the extent necessary to justify the Supreme Court's action in this case under the constitution? A reading of those amendments does not compel the conclusion that they work such a drastic change in traditional

bail thinking. There is nothing really novel about considering the quantity of drugs involved in a case as a method of estimating the seriousness of the violations charged. Nor is there anything novel about altering the surety necessary to support a bail bond to comport with the demonstrated financial capacity of a particular defendant. But the use to which the amendments to the Illinois statutes[1] in combination has been put in this case extends far beyond that. If they are said to provide an excuse for setting a million dollar cash ransom for the pre-trial release of these unconvicted Petitioners, then, we respectfully submit their use is but a subterfuge, albeit a legislatively authorized one, to evade the plain provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Some discussion of the street value concept is in order. The testimony of the policeman in this case is typical. Based upon the figures in his testimony concerning the price of illicit cocaine on the streets of Chicago, at least eleven different calculations of the ultimate street value of the cocaine involved in this case are possible. They range from $7,862,400 at the high end of the spectrum to a low of $436,800. Any concept of street value must, by it's nature, be inexact, but a standard for bail as vague as all that ought not be permitted to stand.[2]

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[1] In the only decision counsel has found dealing with the recent Illinois amendments, *Garcia v. Elrod*, N.D. Ill. No. 86 C 4779 (September 5, 1986), District Judge Shadur has read the statutes in a manner quite consistent with our reading of them. He held in *Garcia* on petition for Habeus Corpus that a bail set simply at the asserted street value of the drugs involved (in that case $607,000) was arbitrary and hence in violation of the Eighth and Fourteenth Amendment. Because *Garcia v. Elrod* has not been otherwise published, we have reproduced that opinion in the appendix, A-5, *et. seq.*

[2] For cases involving appropriate standards of vagueness see *Kolender v. Lawson*, 461 U.S. 352; *Smith v. Goguen*, 415 U.S. 566; *Giaccio v. Pennsylvania*, 382 U.S. 399; *Winters v. New York*, 333 U.S. 507.

The state statutes ought to be read, consistent with the Eighth Amendment, simply to permit the judicial officer making a bail bond determination to consider the street value factor along with all of the more traditional bail bond considerations, e.g., residence, employment, family ties, and prior criminal background, to reach a monetary figure[3] where necessary that is consistent with the presumption of innocence, adequate to ensure reappearance, and less than excessive under the Eighth Amendment.

The Eighth Amendment prohibits any pre-trial requirement of "excessive" bail. That prohibition applies against state authority through the Fourteenth. Bail set arbitrarily in an amount greatly in excess of the ability of an accused to post and without apparent consideration of any of the traditional factors usually a part of the bail decision is excessive. We respectfully suggest that is precisely what occurred in this case. One million dollars cash is an arbitrary amount. The Supreme Court of Illinois articulated no basis for that figure at all. None of the traditional factors support it. There is no appreciable danger of flight or violence and neither Petitioner has a previous record. The amount is predictably well beyond the ability of Petitioners to post.

It appears, moreover, that the ostensible basis for all this lies in two recent amendments to the Illinois statutes concerning bail bonds in drug cases. It is clear that in ruling as it did in this case, the State's highest court has virtually invited violations of the Eighth Amendment as a matter of course in drug cases. Because of the importance of the question

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[3] We note in passing that any requirement of full cash to secure a bail bond is, to some extent at least, a step away from the Illinois ten percent system also utilized in many federal courts. That system, considered by this Court in *Schilb v. Kuebel*, 404 U.S. 357, has been the subject of almost universal praise for its elimination of the abuses attendant upon a system involving professional bondsmen, abuses which not only magnified the advantages of wealth but also tended to corrupt and trivialize the practice of law.

whether prohibitive pre-trial bail may be required in drug cases consistent with the constitution, we seek this Court's writ of Certiorari to the Supreme Court of Illinois.

CONCLUSION

For the reasons discussed above, we respectfully petition this Court to issue its Writ of Certiorari to the Supreme Court of Illinois to review that Court's judgment in the instant case.

Respectfully submitted,

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APPENDIX

Nos. 63354, 63355 Cons.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE STATE OF ILLINOIS, *Appellant,*	Appeal, Appellate Court First District 86-651
vs.	Circuit Court of Cook County Honorable **Richard Fitzgerald,** Judge Presiding 86-CR-4046
LAMONT MOORE, *Appellee.*	
PEOPLE STATE OF ILLINOIS, *Appellant,*	Appeal, Appellate Court First District 86-652
vs.	Circuit Court of Cook County Honorable **Richard Fitzgerald,** Judge Presiding 86-CR-4046
EDWIN BRYCE. *Appellee.*	

ORDER

FILED
AUG 6 1986
SUPREME COURT CLERK

This cause coming to be heard on the motion of the appellees, objections having been filed by the appellant, and the court being fully advised in the premises;

IT IS ORDERED that the motion for reconsideration of this court's orders of May 22, 1986, and June 25, 1986, is *denied*.

Simon, J., took no part.

Nos. 63354, 63355 Cons.

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois, *Appellant*	
vs.	Appeal, Appellate Court First District 86-651
Lamont Moore, *Appellee*	Circuit Court Cook County 86-CR-4046
People State of Illinois, *Appellant*	Appeal, Appellate Court First District 86-652
vs.	Circuit Court Cook County 86-CR-4046
Edwin Bryce, *Appellee*	

ORDER

The appellees' motion to dismiss appellant's motion to increase bond is denied. The appellant's motion to increase bond is allowed in part. The bonds set in these cases are increased to $1 million, full cash.

FILED
JUN 25 1986
SUPREME COURT CLERK

NO. 86-651

IN THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST DISTRICT
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* *vs.* **LAMONT MOORE** *Defendant-Appeallant.*	Appeal from the Circuit Court of Cook County, Illinois — 86 MC1 – 113183 — Honorable **Thaddeus Kowalski** presiding

ORDER

This matter coming to be heard on the amended emergency motion of Lamont Moore for the reduction of bail; due notice delivered to the States Attorney of Cook County; the Court having ordered a response to the motion; the Court being fully advised in the premises;

IT IS ORDERED:

1. That the emergency motion for reduction of bail is allowed.

2. That bail pending trial is set in the amount of $200,000.00 and the defendant shall deposit a sum of money with the Clerk of the Circuit Court equal to 10% of the bail as security.

3. That all other conditions imposed by the Trial Court shall continue to apply.

FRANCIS S. LORENZ
JUSTICE

R. EUGENE PINCHAM
JUSTICE

JAMES C. MURRAY
JUSTICE

NO. 86-652
IN THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST DISTRICT
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* *vs.* **EDWIN BRYCE** *Defendant-Appeallant.*	Appeal from the Circuit Court of Cook County, Illinois 86 MC1 – 113182 Honorable **Thaddeus Kowalski** presiding

ORDER

This matter coming to be heard on the Defendant's emergency motion for the reduction of bail; due notice delivered to the States Attorney of Cook County for instanter hearing; the State's Attorney having previously filed their objections to the reduction of bail with the Court; and the Court being fully advised in the premises;

IT IS ORDERED:

1. That the emergency motion for reduction of bail is allowed.

2. That bail pending trial is set in the amount of $200,000.00 and the defendant shall deposit a sum of money with the Clerk of the Circuit Court equal to 10% of the bail as security.

3. That all other conditions imposed by the Trial Court shall continue to apply.

4 That the Sheriff of Cook County is authorized and directed to accept bail in the amount above stated should the Clerk Of The Circuit Court be closed upon receipt of this order.

DATED:

FRANCIS S. LORENZ
JUSTICE

R. EUGENE PINCHAM
JUSTICE

JAMES C. MURRAY
JUSTICE

ORDER ENTERED MAR 21 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALVARO GARCIA, *Plaintiff,*		
vs.		No. 86 C 4779
RICHARD ELROD, *Defendant.*		

MEMORANDUM OPINION AND ORDER

Alvaro Garcia ("Garcia") has filed a 28 U.S.C. §2254 ("Section 2254") petition against Cook County Sheriff Richard Elrod ("Sheriff"), seeking a writ of habeas corpus because of Garcia's allegedly unconstitutional pretrial detention on state drug charges. Sheriff has filed an answer (the "Answer") and, after this Court's July 22 oral bench ruling had found the Answer legally insufficient, an amended answer (the "Amended Answer") to Garcia's petition. For the reasons stated in this memorandum opinion and order, Garcia's petition for a writ is granted.

Both Garcia and Sheriff, through their respective counsel, have agreed no evidentiary hearing is required to supplement the record tendered to this Court. They are right, for the transcripts of the state court bond proceedings (September 25, 1985 ("Tr. 1- -") and October 3, 1985 ("Tr. 2- -")) pose the constitutional question as entirely one of law. Accordingly the petition may properly be dealt with on the basis of that state court record (see Rule 8(a) of the

Rules Governing Section 2254 Cases in the United States District Courts).

One threshold matter, dealt with by this Court in its July 22 oral ruling, should be mentioned first. Sheriff's Answer had asserted Garcia's failure to exhaust state remedies. But Garcia has brought the selfsame excessive bond question to the Illinois Supreme Court in direct conformity with Illinois Supreme Court Rule 604(c), Ill. Rev. Stat. ch. 110A, ¶604(c) (having first taken the question to the Illinois Appellate Court, as the same rule required). Under Illinois law (*People v. Saunders*, 122 Ill.App.3d 922, 928, 461 N.E.2d 1006, 1011 (2d Dist. 1984)) Rule 604(c) has become a pretrial defendant's "sole avenue of relief," having supplanted the earlier availability of an original petition to the Supreme Court for a writ of habeas corpus. No Illinois law supports, and there is no point in compelling Garcia to search for, any alternative route of state relief (whether the now-superseded state habeas corpus or otherwise).

This Court then proceeds to the merits. No issue of any claimed (and likely nonexistent, see discussion in *United States v. DiVarco*, 602 F.Supp. 1029, 1033-34 (N.D. Ill. 1985) and cases cited there) unqualified "right to bail" is involved. Nor does Garcia challenge the constitutionality of the recently-enacted Illinois Bail Act as embodied in Ill. Rev. Stat. ch. 38, ¶110-5(a) and (b) ("Section 110-5"), pursuant to which Circuit Judge Thaddeus Kowalski assertedly set bail for Garcia:

> (a) In determining the amount of monetary bail or conditions of release, if any, which will reasonably assure the appearance of a defendant as required or the safety of any other person or the community, the court shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, the condition of the victim, the likelihood of the filing of a greater charge, the weight of the evidence against

such defendant, his family ties, employment, financial resources, character and mental condition, past conduct, prior use of alias names or dates of birth, length of residence in the community, whether a foreign national defendant is lawfully admitted in the United States of America, the amount of unrecovered proceeds lost as a result of the alleged offense, record of convictions, and any record of appearance at court proceedings, flight to avoid arrest or prosecution, escape or attempted escape to avoid arrest, or failure to appear at court proceedings. Information used by the court in its findings or stated in or offered in connection with this Section may be by way of proffer based upon reliable information offered by the State or defendant. A proffer by the State must be based upon a written report. All evidence shall be admissible if it is relevant and reliable regardless of whether it would be admissible under the rules of evidence applicable at criminal trials.

(b) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Considerate of the financial ability of the accused.

(4) When a person is charged with a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance as defined in the Cannabis Control Act, as amended, or the Illinois Controlled Substances Act, as amended, the full street value of the drugs seized shall be considered. "Street value" shall be determined by the court on the basis of a proffer by the State based upon reliable information of a law enforcement official contained in a written report as to the amount seized and such proffer may be used by the court as to the current street value of the smallest unit of the drug seized.

Instead the Eighth Amendment[1] question for this Court is that identified in *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1133 (7th Cir. 1984), quoting *Simon v. Woodson*, 454 F.2d 161, 165 (5th Cir. 1972) (emphasis in original):

> Thus, the only issue to be resolved by a federal court presented with a habeas corpus petition that complains of excessive bail is whether the state judge has acted *arbitrarily* in setting that bail.

That accurately describes what happened in Garcia's case. Confronted with charges of distribution of cocaine and a drug conspiracy of major proportions,[2] Judge Kowalski originally set Garcia's bail at $12 million (Tr. 1-28). Then on the motion for reduction a week later, Judge Kowalski focused on the week-old new version of Section 110-5 (it had been signed by Governor Thompson, and thus became effective, on the very same day as the original hearing) and lowered the bond to $607,000, the same amount as the asserted street value of the seized cocaine. Judge Kowalski said only (Tr. 2-53 to -54):

> THE COURT: I have the issue in front of me and I have to resolve it. I look upon this case as the case where the legislature is speaking to me under Section 110-7, stating it is a Class X felony, and the Court may require the Defendant to deposit a sum equal to 100 percent of the bail and as to the value. Therefore, on Mr. Garcia and on Mr. Fleites, I will set the bond at $670,000 cash, and I will make it

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[1] As this Court frequently observes, the practice of litigants and courts in referring to underlying Bill of Rights provisions where state actors are involved, though imprecise, is often convenient. Garcia's claim, of course, is a Fourteenth Amendment due process claim that incorporates the Eighth Amendment's guaranty against imposition of "excessive bail."

[2] Testimony disclosed the delivery of a kilogram of 90% pure, high-grade cocaine (Tr. 1-7 to -10) with an asserted total street value of $607,722 (Tr. 1-4), together with negotiations for future deliveries of a great deal more cocaine (Tr. 1-10 to -11).

$150,000 on Mr. Noriega, cash.

Though Judge Kowalski did not articulate his reason for acting as he did in Garcia's case, what is plain is that the judge's decision was *controlled* by the asserted street value of the narcotics rather than, as the statute required, the "full street value of the drugs seized [being] considered." [3] It is quite apparent that had the street value been calculated at (say, to pick another figure arbitrarily) $502,000,[4] *that* would have been the amount of the bond. And of course the *legitimate* constitutional considerations for setting bond--essentially to assure the defendant's appearance in court when required and to assure the safety of other persons and the community[5]--are not at all arithmetically proportionate to the amount involved in the drug transaction (at least where, as in this case, the defendant no longer has either the drugs or their value as a potential means and incentive for flight).

This Court should not be misunderstood as finding, or even suggesting, what a *proper* and *non-arbitrary* consideration of the relevant factors would generate in terms of a bail figure. With all relevant evidence before the state court, and with the proper considerations being applied, it is perhaps conceivable

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[3] Codefendant Noriega was obviously placed under a lower bond because of other (and of course permissible) considerations (Tr. 2-54):

> THE COURT: .... He was just the person that drove the car. We heard nothing other than that although he was there and drove the other two.

[4] There was of course no magic about the $607,722 figure. What was *paid* for the kilogram of cocaine was $42,500. That was translated to the nearly 15-fold higher figure by use of a chart (see Tr. 1-18 to -19) that obviously subsumed various assumptions about cutting the cocaine for individual consumption and about realizable market value of the ensuing small-quantity distributions.

[5] Section 110-5(b)(1), (2) and (3)--as well as Section 110-5(a)--set out the entirely appropriate criteria for application by the judge setting the amount of bail.

that $607,000 in bail might be called for- -though on the record before Judge Kowalski that amount was certainly arbitrarily excessive, and that record does not suggest any real likelihood that further inquiry would show that figure to be proper. That decision, however, is for the state court judge to make.

But what controls this habeas case is that the state court judge cannot, in reaching that decision, do what Judge Kowalski has done to Garcia: surrender his judicial discretion in favor of setting a bail amount identical to the drugs' street value, on the mistaken assumption the Illinois General Assembly has equated street value with reasonable bail. It has not.[6] There is no unconstitutional infirmity in the Act- -only in its erroneous application here.

Accordingly the petition for a writ of habeas corpus is granted. Because all Garcia is entitled to is a constitutional setting of bail, not freedom per se, issuance of the writ will be stayed until September 30, 1986 to permit a bond hearing applying constitutionally permissible standards.

MILTON I. SHADUR
MILTON I. SHADUR
United States District Judge

Date: September 5, 1986

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[6] If it had, that equation would have been equally arbitrary, thus itself running afoul of the Eighth Amendment.